

STATE OF MICHIGAN
COURT OF APPEALS

LOU LOU’S, LLC d/b/a DOLLY’S PIZZA,

Plaintiff-Appellant,

v

TRUCK INSURANCE EXCHANGE,

Defendant-Appellee.

UNPUBLISHED

October 22, 2015

No. 322558

Oakland Circuit Court

LC No. 2013-135126-CK

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

The trial court entered an order dismissing this case as the result of plaintiff’s failure to comply with a discovery order. For the reasons set forth below, we reverse and remand to the trial court for further proceedings consistent with this opinion.

This case arises from an insurance dispute concerning plaintiff’s pizzeria. Plaintiff filed an insurance claim for damages arising out of alleged vandalism to the business on April 29, 2012. At the time of the alleged vandalism, Robert Baldrige was the sole member of plaintiff LLC, and Baldrige submitted the insurance claim to defendant. However, on June 27, 2013, Baldrige executed a purchase agreement that conveyed his interest in the LLC to his daughter and son-in-law, Andrea and Hagop Babikian. After an investigation, defendant ultimately denied the insurance claim, and plaintiff (the Babikians) commenced the current suit.

During the course of the lawsuit, plaintiff filed a motion to compel Baldrige’s deposition, asserting that his testimony was necessary to obtain information regarding the business and the alleged loss. Plaintiff responded, claiming that Baldrige was estranged from the Babikians, living in an unknown location in the Upper Peninsula, and that plaintiff had been unable to obtain his cooperation with the lawsuit. The court granted defendant’s motion to compel, and, when plaintiff was unable to comply with the discovery order, further granted defendant’s motion to dismiss.

Plaintiff argues that the trial court abused its discretion in dismissing plaintiff’s case as a sanction for failing to comply with the discovery order that plaintiff produce Baldrige for a deposition. We agree. “We review the trial court’s decision to impose [discovery] sanctions for an abuse of discretion.” *Hardrick v Auto Club Ins Ass’n*, 294 Mich App 651, 659; 819 NW2d 28 (2011). “An abuse of discretion occurs when the decision is outside the range of principled outcomes.” *Id.* at 659-660.

“The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery.” *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000). “Because the imposition of sanctions is discretionary, the trial court should carefully consider the circumstances of the case to determine whether a drastic sanction, such as dismissing a claim, is appropriate.” *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Indeed, “the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.” *Duray Dev, LLC v Perrin*, 288 Mich App 143, 165; 792 NW2d 749 (2010), quoting *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). This Court has provided a nonexhaustive list of factors that should be considered when determining if a trial court abused discretion in ordering discovery sanctions:

(1) [W]hether the violation was wilful or accidental; (2) the party’s history of refusing to comply with discovery requests . . . ; (3) the prejudice to the defendant; (4) . . . ; (5) whether there exists a history of plaintiff’s engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court’s order; (7) an attempt by the plaintiff to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. [*Duray Dev*, 288 Mich App at 165, quoting *Dean*, 182 Mich App at 32-33.]

In regard to the instant case, we first note that the record is absent any consideration by the trial court of these factors. The record also reflects that the trial court did not consider lesser sanctions before dismissing plaintiff’s case for failing to comply with its discovery order, and the trial court completely disregarded the listed factors in making its decision.

Moreover, we conclude that if the trial court had considered these factors, it likely would have reached a different decision. There was no evidence on the record that plaintiff had a history of refusing to comply with discovery requests or deliberately delayed the proceedings. There was also no evidence that plaintiff’s violation was willful. Rather, plaintiff made several attempts to locate Baldrige, stating that Hagop traveled to Pelkie, Michigan, where he believed Baldrige resided. Upon arriving, however, Baldrige called the police and ordered him to leave the property. Additionally, plaintiff explained that its counsel wrote a letter requesting Baldrige’s cooperation in this matter. Further, we are not convinced that plaintiff’s failure to obtain Baldrige’s deposition prejudiced defendant. Defendant merely claimed that Baldrige’s deposition was “important,” but failed to explain what information it may collect from Baldrige. This is especially true considering the fact that defendant previously deposed Baldrige under oath, after the insurance claim was initially made. The trial court did not consider the adequacy of Baldrige’s prior testimony, or whether Baldrige could even provide additional information. Moreover, both plaintiff and defendant are capable of subpoenaing Baldrige for a deposition pursuant to MCR 2.306(B)(3). In light of the personal issues prevalent between Baldrige and the Babikians, we fail to see why, as an alternative to outright dismissal, defendant should not attempt to subpoena or depose Baldrige itself, as its attempt may prove more fruitful as a neutral party. Finally, we note that apart from the trial court’s order, defendant provided no authority or argument for the proposition that it is plaintiff’s responsibility to physically make its previous owner present. Accordingly, we conclude that by

failing to consider whether the sanction was just and proper in the context of the circumstances of the case, the trial court abused its discretion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly